IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:016179/2022

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
DATE	SIGNATURE
22/09/2023	**N V KHUMALO**

In the matter between:

DISCOVERY HEALTH (PTY) LTD **APPLICANT**

And

ROAD ACCIDENT FUND **FIRST RESPONDENT**

MINISTER OF TRANSPORT **SECOND RESPONDENT**

In re:

DISCOVERY HEALTH (PTY) LTD **APPLICANT**

and

ROAD ACCIDENT FUND **1ST RESPONDENT**

MINISTER OF TRANSPORT **2ND RESPONDENT**

'This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time of hand-down is deemed to be 22 September 2023.

JUDGMENT – LEAVE TO APPEAL (18 (1) and 18 (3) DECISION)

N V KHUMALO J

Introduction

[1] In this urgent Application, the Applicant, Discovery Health (Pty) Ltd) ("Discovery") is seeking leave to appeal to the full court or Supreme Court of Appeal against a whole judgment and order of the court delivered on 26 June 2023, dismissing Discovery's Application in terms of s 18 (1) and (3) of the Superior Court Act 10 of 2013 (the Act) ("s 18 (3) decision") for an order uplifting the suspension on the operation or execution of an interdictory order and judgment against the 1st Respondent, the Road Accident Fund ("the Fund") delivered by Mbongwe J on 26 October 2022 ("Mbongwe J judgment"). The Application was pending the decision on the Fund's Application for leave to appeal the Mbongwe J Judgment that is now imminent at the Constitutional Court. Mbongwe J dismissed the Fund's Application for leave to appeal on 23 January 2023.

[2] In his Judgment Mbongwe J's declared unlawful and set aside a directive issued by the Fund's Acting Chief Claims Officer for the rejection of road accident victim's claims for past medical expenses in circumstances where such expenses had not been paid by the claimants but by their medical aid schemes. He also made an order interdicting the Fund from acting in accordance with the directive.

The right to appeal

[3] The Fund is opposing Discovery's Application for leave to appeal the Rule 18 (3) decision, first on a point *in limine*, disputing that Discovery has a right to appeal the

s 18 (3) decision, seeing that it is an interlocutory decision. It points out that the appeal procedure as per s 18 (4) is available only to a party against whom the execution has been granted, *in casu* it would have been the Fund, had the court decided otherwise. As a result, there being nothing in the section or whole Act that suggests that the unsuccessful party in a s 18 (3) Application has a right to appeal against the dismissal of such an application, let alone on an urgent basis. The Fund argued that Discovery is not allowed to bring an application for leave to appeal the s 18 (3) decision. The argument was premised mainly on the fact that the application for leave to execute pending an appeal is interlocutory in nature and the decision generally not appealable. In essence accepting that a party facing an execution order afforded preferential treatment by the legislature, due to the harm perceived in the enforcement of the judgment,

[4] On the other hand Discovery submitted that it is in the interest of justice that leave to appeal against the interlocutory decision be heard and granted because the appeal raises exceptional circumstances and failure to grant leave to appeal would result in irreparable harm. Furthermore, that the Rule 18 (3) order refusing leave to execute is final in effect to the extent that it is not alterable by the court and its immediate and substantial effect occasioning ongoing and irreparable harm to Discovery, the medical schemes it administers and their members. Lastly, on the basis that the court has made factual and legal findings contradictory to the findings of Mbongwe J's judgment resulting in conflicting judgments in the matter. The Application for leave to appeal is brought in terms of s 16 (1) (a) (i) and s 17 (1) of the Act read with Rule 49 (1) (b) of the Uniform Rules of Court ("the Rules").

[5] In respect of the assertion that the Application for leave to appeal is brought under sections 16 (1) (a) (i) and 17 (1) read with Rule 49 (1) (b) the Fund contends that both instruments make no provision for leave to appeal the s 18 (3) decision. It should be pointed out without wasting time that the provision of s 16 (1) (a) (i) deals with the court with which the appeal will lie on granting of the leave to appeal and Rule 49 (1) (b) is about the procedure applicable when leave not requested at the time of Judgment, both instruments not taking the matter anywhere.

[6] It is more prudent to deal with the point *in limine* raised by the Fund as it would determine if the application is properly before the court. Section 18 (4) reads:

> *"(4) if a court orders otherwise, as contemplated in subsection1) –*
>
> *(i) The court must immediately record its reasons for doing so;*
> *(ii) The aggrieved party has an automatic right of appeal to the next highest court;*
> *(iii) The court hearing such an appeal must deal with it as a matter of extreme urgency; and*
> *(iv) Such order will be automatically suspended, pending the outcome of such appeal.*

[7] The general principle of statutory interpretation is that the words used in a statute should be understood in their normal grammatical sense, unless this would lead to an absurd result. In *Cool Ideas 1186 CC v Hubbard and Another*[1], the Constitutional Court added three additional principles to this general rule. Firstly, statutes should be interpreted purposively. Secondly, the relevant statutory provision must be properly contextualized, and lastly, all statutes must be construed consistently with the Constitution. The three principles meant to guide the interpretation of statutes and ensure that the law is applied in a manner that aligns with the intended purpose and constitutional principles.

[8] Taking into consideration the gravity of the consequences of execution, and the purpose for suspension thereof pending the appeal, and the grammatical context of the provision, it is clear and reasonable that only the party against whom the extra ordinary order of execution is granted is afforded an automatic right to appeal, notwithstanding such an order (interlocutory order) generally not being appealable, and that the right exercisable with immediate effect. It is therefore a special right afforded the party facing an execution order whilst the merits are being challenged on appeal.

[1] 2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28

[9] In *Ntlemeza v Helen Suzman Foundation,*[2] the court concluded that*:*

> "23] As can be seen, s 18(4)(ii) has made orders to execute appealable, fundamentally altering the general position that such being purely interlocutory orders, they were not appealable. Moreover, it granted to a party against whom such an order was made, an automatic right of appeal. In addition s 18(3) requires an applicant for an execution order to prove on a balance of probabilities that he or she 'will' suffer irreparable harm if the order is not granted and that the other party 'will not' suffer such harm."

[10] I agree with the sentiments expressed by the court in *Ntlemeza* that in the instance of s 18 (4) (ii) the order to execute has been made appealable, however only in respect of the party against whom the order has been granted. The party refused the order to execute has no right to appeal, such decision being purely interlocutory and therefore generally not appealable. Seeing that a number of judgments of this court have relaxed the rule that purely interlocutory orders were not appealable, on the basis mainly that an appeal may be heard in the exercise of the court's inherent jurisdiction in extraordinary cases where grave injustice was not otherwise preventable[3] I am of the view that the party refused the execution order can approach the court for leave to appeal on such basis. In *City of Tshwane Metropolitan Municipality v Afriforum and Another*[4]; it was stated that:

> [40] The strict common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before,[5] appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has revilitised the final effect of the order or the

[2] [2017] ZASCA 93

[3] *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93

[4] 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) (21 July 2016)

[5] *Zweni v Minister of Law and Order* **1993 (1) SA 523** (A) (*Zweni*) at paras 532J-533A

disposition of the substantial portion of what is pending before the review court, in determining appealability.[6]

[11] In the meanwhile, the court had earlier in *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others*[7] para 17 held that:

> There is no pre-ordained divide between appealable and non-appealable issues. Provided a dispute relates to a constitutional matter, there is no general rule that prevents this Court from hearing an appeal against an interlocutory decision such as the refusal of an interim interdict. However, it would be appealable only if the interests of justice so demand. Thus, this Court would not without more agree to hear an appeal that impugns an interlocutory decision, especially because such a decision is open to reconsideration by the court that has granted it. Doing so would be an exception rather than the norm." (my emphasis)

[12] In S v S *and Another* [2019] ZACC 22, "the position on interlocutory orders cautioned that it is not now a free for all was affirmed by Nicholls AJA stating the following:

> "[46] Not all litigants have the right to appeal. This Court has on more than one occasion stated that it is generally not in the interests of justice for leave to be granted to appeal an interim order. This would defeat the interim nature of that order. That there is no right to appeal interlocutory orders has been held to be constitutional by the courts on numerous occasions.[8]"

[13] On paragraph 47 Nicholls AJA however went on to state that:

> "It is only in limited circumstances where the interests of justice dictate otherwise that appeals of interim orders have been countenanced by this Court.[9] In *Children's Institute*, because the interlocutory order was final in

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[6] 532J-533A

[7] [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) (*Informal Traders*)

[8] *Minister of Health v Treatment Action Campaign (No 1)* [2002] ZACC 16; 2002 (5) SA 703 (CC); 2002 (10) BCLR 1033 (CC); *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A).

[9] *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC); *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC);

effect, leave to appeal was granted.[10] In *Albutt*, the interim nature of the order was found not to be the determining factor but the crucial issue was whether it was in the interests of justice to grant leave.[11] The interim nature was taken into account in determining the overall inquiry into the interests of justice.[12] This is a fact specific enquiry.[13] (my emphasis)

[14] In my view, following on these authorities I do not understand the provisions of s 18 (4) to deny a party refused leave to execute the order, the right to apply for leave to appeal. As I do not think that s 18 (4) was intended to violate such a party's right to access to courts that is protected by s 34 of the Constitution, by preventing such a party to approach the court with the purpose to persuade it if the application for leave justiciable, given the nature of the order. It just meant that the party seeking to execute is not afforded an automatic right to appeal, that is, the privilege of bypassing the typical screening process outlined in the general provisions of ss 16 and 17 of the Act. He however seeks a special leave since the order is generally not appealable, it being an interim order.

[15] The rule against interim order was found therefore flexible as confirmed in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[14]

> [24] It is so that courts are rightly reluctant to hear appeals against interim orders that have no final effect and that in any event are susceptible to reconsideration by a court when the final relief is determined. That, however, is not an inflexible rule. In each case, what best serves the interests of justice dictates whether an appeal against an interim order should be entertained. That accords well with developments in case law dealing with when an appeal against an interim order may be permitted.[17]

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and *Children's Institute v Presiding Officer, Children's Court, Krugersdorp* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC).

[10] *Children's Institute* id at para 16.

[11] *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (2) SACR 101 (CC); 2010 (5) BCLR 391 (CC) at para 22.

[12] Id.

[13] Id at para 23.

[14] 2012 (6) SA 223 (CC); (CCT 38/12) [2012] ZACC 18

[16] In *National Union of Metal Workers of SA and Others v Fry's Metal*[15] at para 29 this Court [per L Mpati DP and Edwin Cameron JA] held that s 34 of the Constitution does not explicitly provide for a right of appeal. Unlike s 35(3)(o) of the Constitution, which specifically includes a right of appeal or review for accused persons in their right to a fair trial, the court explained that s 34 does not inherently imply the same right. The Court stated that even if it did, any such right could be subject to reasonable limitations and justifiable restrictions as in this instance.

[17] The inference then drawn from the provisions of s 18 (4) specially granting an automatic right to appeal to the party against whom execution is granted is that the party who seeks leave to execute the Judgment, may approach the court for leave to appeal the generally not appealable decision as is the norm, going through the screening process outlined in the general provisions of ss 16 and 17 of the Act, taking into consideration, inter alia, the bar that has been set so very high as the basis for departure from the default position, namely, exceptional circumstances in s18 (1) which must be read in conjunction with the further requirements set by s18 (3) to determine if in the interest of justice that leave to appeal be granted.

[18 In *casu,* the issue to be determined is whether Discovery, not being the party granted an automatic right to appeal by virtue of s 18 (4) (ii), has made a proper case, by proving the existence of exceptional and special circumstances, that the court would regard it to be in the interest of justice that the matter be heard and leave to appeal be granted, notwithstanding the decision having been made in an interlocutory application.

[19] Section 17, on leave to appeal reads:

17. Leave to appeal

> *(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that—*

[15] [2005] ZASCA 39; [2005] 3 All SA 318 (SCA)

> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.*

[20] Taking into account what constitutes reasonable prospects of success in terms of section 17(1)(a), the Supreme Court of Appeal in *S v Smith*[3] resolved that:

> "[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[21] The section therefore raises the threshold of the reasonable prospects of success test requiring a measure of certainty rather than just an existence of a mere possibility that another court will, not might, find merit in the arguments advanced on behalf of the Applicant both on facts and law.

[22] The basis of Discovery's Application is that it is in the interest of justice that they should be granted leave to appeal the interlocutory order for the reason that;

[22.1] There are sound reasons to conclude that there are reasonable prospects of success on appeal.

[22.2] This court's factual and legal finding fundamentally contradicts the findings in Mbongwe J's judgment, as a result there are conflicting judgments on the matter under consideration.

[23] Discovery had also referred to the exceptional circumstances and irreparable harm that it alleged would result from the refusal to grant it leave to execute Mbongwe J's order as a reason justifying it being heard and granted leave to appeal. It further alleged that the order refusing execution was actually final in effect in that it had substantial and immediate effect which occasions the ongoing and irreparable harm suffered by Discovery, the Medical schemes it administers and their member claimants. The same argument advanced during the s 18 (3) application,

[24] The crux of the matter that had to be established in the s 18 (3) Application in relation to the Applicant, is, inter alia, the harm allegedly suffered by the mentioned medical schemes and their member claimants that remains irreparable if the default position is not altered. The enquiry culminated in three jurisdictional requirements, one being proof of harm, the second being that the harm should be irreparable and lastly must be resultant from the default position (the suspension of the operation of the order). The harm irreparable in the sense that the party suffering such harm would have no or substantial recourse now and or in the future as a direct consequence of the suspension of the order. The three scenarios proven to exist on a balance of probabilities for consideration if granting of the leave to execute would be justifiable. This, the Applicant has to prove irrespective of what is the situation regarding the Respondent as explained *by* Sutherland DJP in *Incubeta Holdings* that:

> "if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, <u>if the loser will not suffer irreparable harm, the victor must</u>

nevertheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the *South Cape* test." (my emphasis)

[25] As Discovery could not prove the harm that is irreparable on itself and those in whose interest it alleges to act, that was the end of the matter, irrespective of whether irreparable harm on the Fund has been proven or not. Due to the fact that the suspension of the execution of the decision pending the appeal is automatic. This put to rest the contention by Discovery that the Fund failed to prove any irreparable harm, as, it did not exonerate Discovery from the requirement to show or prove irreparable harm on its side.

[26] Discovery has alleged to be suffering a financial loss that it says is irreparable or irrecoverable. So in a sense the order final in effect, no matter what circumstances prevail at the time the merits of the matter are decided, as it leaves Discovery, the medical schemes and its member claimants without a recourse, therefore should be appealable. In the Judgement that allegation was dealt with extensively, addressing the remedies and or recourse available to the medical schemes and to their member claimants. Moreover, mindful that neither Discovery nor the medical schemes it represents have a right to directly claim from the Fund, the right to compensation being that of the member claimants as the road accident victims (the medical scheme).

[27] Furthermore, the court's judgment makes reference to the fact that on rejection of the claim (which is what the interdictory order is to prevent), the member victims whose right it is to claim compensation, have a recourse to enforce the claim against the Fund, whilst the arrangement between the medical schemes' and its clients, that of reimbursement remains viable. The court's judgment together with Mbongwe J's refer to other possible remedies, that of subrogation and or cession that remain as options to be exercised between the two parties in whose interest Discovery is said to be acting. Both options in Mbongwe J disregarded as expensive options. However, it dispels the fact that the harm is irreparable. Discovery would rather by pass the member claimants in whom it has alleged to have no faith to do the right thing, and legally have no right to prevent from conducting their cases in whatever manner they so wish including negotiating settlements, to secure direct payment from the Fund.

[28] Discovery has not indicated to seek to stop the rejection of the medical expenses claim as per order granted by Mbongwe J but to prevent, the voluntary settlement of the claims that excludes medical expenses although it conceded that legally it cannot prevent that from happening. Similarly, the order does not interdict the voluntary settlement by claimants who chooses to do so. The position of Discovery, and the medical schemes would still remain the same, with no direct claim from the Fund as the member claimants who are (mostly) represented have not divested their right to claim or settle.

[29] In that regard Discovery has been found to have failed to prove on a balance of probabilities an irreparable loss occasioned by the suspension of the order. Consequently, the argument on the harm being irreparable and the order of final effect refutable. There is therefore no measure of certainty that another court would arrive at a different conclusion.

[30] Furthermore the court cannot impose contractual obligations that are between the medical schemes and their members unless there is a dispute between the parties brought before court for adjudication. The allegation that there are rules that impose an obligation on the members of medical schemes to reimburse the scheme has not been disputed but it is not correct to suggest that the payment of benefits to the claimants is reliant upon such obligation and also does not transfer the right to claim compensation to the medical scheme.

[31] The issue of an Undertaking offered by Discovery without security, in exchange of a payment sought from the Fund has also been addressed adequately in the Judgment, considering that the right to claim compensation is that of the member claimants who have their own representation. Further that the payment is not required to ease the harm but for preservation. Its alleged purpose defeats the reasons for the automatic suspension of the execution order moreover when Discovery has failed to prove irreparable harm.

Allegation of Contradictory Judgments

[32] It is also alleged on behalf of Discovery that Mbongwe J's judgment found that Discovery suffers irreparable harm on a daily basis and the matter urgent. Yet Mbongwe J did not find it in him to grant Discovery leave to execute the order with immediate effect in the s 18 (1) and (3) Application brought by Discovery before him simultaneous with the Fund's leave to appeal his judgment, except granting Discovery costs in the Application. He could have done so, a precedent having been set in the matter of *Ntlemeza* wherein the court opined that " *s 18(1) does not say that the court's power to reverse the automatic suspension of a decision is dependent on that decision being subject to an application for leave to appeal or an appeal. It says that, unless the court orders otherwise, such a decision is automatically suspended."* Mbongwe J 's failure to do so countenance the allegation that he found irreparable harm that was on going on a daily basis and the matter urgent that execution of the order also urgent; In *Ntlemeza*[16] same situation was assessed differently by the court as highlighted in the court's statement that:

> [16] Subsequently, General Ntlemeza applied to the high court for leave to appeal that order (the principal order). HSF and FUL, in turn, filed a 'counter-application', in terms of which they sought, inter alia, as a matter of urgency, a declarator that the operation and execution of the principal order not be suspended by virtue of any application for leave to appeal or any appeal. That court dismissed General Ntlemeza's application for leave to appeal, upheld the counter-application and made an order in the following terms:
>
> '…
>
> 2. The operation and execution of the order granted by this court under case no. 23199/16 on 17 March 2017 is not suspended and will continue to be operational and executed in full whether or not there are any applications for leave to appeal and appeals or whether or not there is any petition for leave to appeal against the said order.

[16] Id, para 16

[33] It is also submitted on behalf of Discovery that Mbongwe J's judgment held that the RAF's directive breaches the RAF statutory duties and is patently unconstitutional and unlawful. He set the directive aside and interdicted the RAF from implementing it. The court's judgment does not make any pronouncements on those findings. Discovery's allegation therefore that the court's judgment contradicts that of Mbongwe J, on the question of law and facts, is therefore untenable.

[34] Furthermore Discovery also alleges that the Judgment on paragraph 45 held that the order of Mbongwe J had the effect of stopping medical schemes from voluntarily negotiating an amicable settlement which encroaches on claimants' right. The paragraph is self-explanatory and in no way are such findings made. Actually what is stated is the opposite, that the interdictory order does not stop voluntary negotiations and resultant settlement by the member claimants whose right it is to claim compensation, which is what Discovery seeks to do. The interdictory order stops the rejection of claims as per the directive. The effect of a refusal to implement the order does not result in irreparable harm as the claimants have a remedy. They can sue the Fund.

[35] The loss being recoverable to the member on behalf of whom the past medical expenses were paid and from whom the medical scheme has a right of recovery or reimbursement. Hence the statement was made that "The Applicant and or the medical schemes cannot claim the expenses that were incurred on behalf of the member Claimants directly from the Fund; see *Rayi NO v Road Accident Fund*[17], circumventing the involvement of the Claimants whose right it is to be compensated.

[36] If Discovery's case was that the settlements concluded were unlawful and causing irreparable harm to member claimants concluding them and the medical schemes, and its aim that they should be interdicted, it should have obtained such an order. The implementation of the interdictory order against the directive will not yield such results. Discovery cannot regard at one instance the settlements not to be

[17] *(*643/2000) [2010] ZAWCHC 30 (22 February 2010)

unlawful and therefore unpreventable and then at the same to be unlawful and therefore requiring an interdict. See Para 44 of the court's judgment.

[37] It should be pointed out that the court's Judgment did not decide the merits of the principal case. The court only dealt with the issues raised by the parties in their papers and in argument, so as to decide the matter that was before it, which is whether Discovery has on a balance of probabilities established the factors required as per provisions of s 18 (1) and 18 (3) to justify the alteration of the default position.

[38] Discovery has also alleged that the order is definitive of the medical scheme's right to claim reimbursements for past medical expenses for the entire period that the Mbongwe J Judgment is suspended due to the appeal whilst during that whole period the directive is implemented and settlements being agreed upon. This point has already been dealt with that the Mbongwe J's Judgment does not interdict settlements between the Fund and member claimants. It bars the rejection of claims for medical expenses against which the claimants have a remedy of action against the Fund. In that case the medical schemes' right to reimbursement remain. The facts on settlements were before Mbongwe J and he nevertheless did not make an order to outlaw settlements.

[39] Discovery has failed to demonstrate sufficient degree of exceptionality to justify the order for leave for the upliftment of the suspension. Neither could Discovery convince the court that there are reasonable prospects that another court would arrive at a different conclusion.

[40] Having further carefully considered the matter I could not find any circumstances that are persuasive that the order is appealable or that it is in the interest of justice that the order be rendered appealable and leave to appeal be granted.

The following order is therefore made:

1. Leave to appeal the s 18 (3) decision is refused with costs of two Counsels..

N.V. Khumalo

Judge of the High Court

Gauteng Division, Pretoria

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